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No. 85-2072

IN THE SUPREME COURT OF THE UNITED STATES

July Term, 1986

DAVID S. SANDS, Petitioner

v.

MICHAEL J. CUNNINGHAM, Warden, New Hampshire State Prison, Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

THE STATE OF NEW HAMPSHIRE

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QUESTION PRESENTED FOR REVIEW

Did a twenty-nine month period between oral argument and rendering of judgment on Petitioner's appeal of some twenty-seven issues to the New Hampshire Supreme Court violate Petitioner's rights to a speedy trial under the Sixth Amendment to the United States Constitution and to due process under the Fourteenth Amendment to the United States Constitution?

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No. 85-2072

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

DAVID S. SANDS, Petitioner,

v.

MICHAEL J. CUNNINGHAM, Warden,
New Hampshire State Prison, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, Michael J. Cunningham, Warden, New Hampshire State Prison, hereby moves that the Petition for Writ of Certiorari be denied on the grounds that the United States Court of Appeals for the First Circuit correctly determined that Petitioner had failed to make the requisite substantial showing of denial of a federal right to warrant

a certificate of probable cause to appeal the district court's denial of his petition for habeas corpus.

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner bases his Petition on the speedy trial provision of the Sixth Amendment to the United States Constitution and the due process clause of the Fourteenth Amendment to the United States Constitution. Petitioner improperly seeks to rely on the due process clause of the Fifth Amendment to the United States Constitution, which is a limitation solely on the federal government and not on state action. Popow v. City of Margate, 476 F.Supp. 1237, 1242 n.2 (D.N.J. 1979).

STATEMENT OF THE CASE

On December 13, 1978, Petitioner, David S. Sands, was found guilty of two counts of perjury after a trial by jury in

the Carroll County, New Hampshire, Superior Court. Petitioner perjured himself by falsely identifying an individual responsible for signing a petition for ex parte attachment in a civil proceeding concerning three intricate real estate transactions. A detailed factual background of this case is contained in the New Hampshire Supreme Court opinion affirming Petitioner's convictions. State v. Sands, 123 N.H. 570, 582-88, 467 A.2d 202, 209-13 (1983).

Petitioner timely appealed his conviction to the New Hampshire Supreme Court. This appeal was briefed by the parties during January and February, 1981. Petitioner and his co-defendant each filed a separate brief and divided the responsibility for discussing numerous legal issues. State v. Sands, supra, 123 N.H. at 588, 467 A.2d at 213. The appeal was argued on March 6, 1981.

Prior to oral argument, four active members of the New Hampshire Supreme Court recused themselves or were otherwise unable to sit. The court specially designated four justices -- three from the New Hampshire Superior Court and one from retirement -- to fill the panel. On April 22, 1981, one of the specially designated justices, Mullavey, J., died. On January 24, 1983, a second justice, Lampron, J., died.

On August 29, 1983, the New Hampshire Supreme Court issued a forty-nine page opinion affirming Petitioner's convictions. State v. Sands, supra. The opinion addressed some twenty-seven statutory, constitutional, and evidentiary issues, including a challenge to the sufficiency of the evidence. Id. During the twenty-nine months between oral argument and the court's decision, Petitioner, who was free

on bail, never requested a speedy disposition of his appeal.

On March 5, 1984, over six months after entry of the New Hampshire Supreme Court opinion, Petitioner filed in the trial court a Motion To Dismiss For Denial Of Speedy Disposition, alleging that delay in deciding his appeal violated his state and federal constitutional rights. On November 28, 1984, after an evidentiary hearing and submission of memoranda of law, the Carroll County Superior Court, (Dunfey, C.J.), denied this motion. Petitioner appealed the denial of this motion to the New Hampshire Supreme Court. On January 4, 1985, that court summarily affirmed the denial of Petitioner's motion to dismiss.

Petitioner began serving his sentence on December 10, 1984, and was paroled on May 17, 1985. On June 19,

1985, he filed a Petition For A Writ Of Habeas Corpus in the United States District Court for the District of New Hampshire. Petitioner raised seventeen constitutional issues, including the claim that delay in deciding his appeal violated his rights to a speedy trial under the Sixth Amendment to the United States Constitution and to due process under the Fifth and Fourteenth Amendments to the United States Constitution. On October 1, 1985, the District Court denied the petition for writ of habeas corpus. The District Court subsequently denied Petitioner's request for issuance of a certificate of probable cause.

On October 31, 1985, Petitioner filed a notice of appeal and a request for issuance of a certificate of probable cause in the United States Court of Appeals for the First Circuit. On March 20, 1986, the Court of Appeals denied

Petitioner's request for a certificate of probable cause.

REASONS FOR DENYING THE WRIT OF CERTIORARI

THIS COURT SHOULD DENY THE PETITION FOR WRIT OF CERTIORARI SINCE (1) THE DISTRICT COURT CORRECTLY DETERMINED THAT THERE IS NO SIXTH AMENDMENT RIGHT TO A SPEEDY APPEAL, (2) EVEN IF SUCH A RIGHT DID EXIST, THERE WOULD BE NO VIOLATION OF THAT RIGHT UNDER THE FACTS OF THIS CASE, AND (3) THE DISTRICT COURT CORRECTLY DETERMINED THAT THE STATE APPELLATE DELAY WAS NOT SO PREJUDICIAL AS TO VIOLATE PETITIONER'S DUE PROCESS RIGHTS.

Petitioner contends that the twenty-nine month period between oral argument and rendering of judgment on his appeal of some twenty-seven issues to the New Hampshire Supreme Court violated his rights to a speedy trial under the Sixth Amendment and the due process under the Fifth and Fourteenth Amendments. However, the district court correctly determined (1) that the Sixth Amendment does not guarantee a convicted defendant a speedy appeal, and (2) that the state appellate delay was not

so prejudicial as to violate Petitioner's due process rights. Thus, the court of appeals properly denied Petitioner's request for a certificate of probable cause.

A. The District Court Properly Held That A Convicted Defendant Has No Sixth Amendment Right To A Speedy Appeal.

In denying Petitioner's petition for writ of habeas corpus, the district court held that "the Sixth Amendment right to speedy trial is inapplicable to [Petitioner's] state appellate proceeding." (Appendix to Petitioner's Petition For A Writ Of Certiorari [hereinafter "Appendix"], p. B-26). Petitioner contends that this holding was error.

The Sixth Amendment guarantees an "accused . . . the right to a speedy and public trial, by an impartial jury." U.S. Const., Amend VI (emphasis added). The plain language of the amendment belies

Petitioner's argument that it also guarantees a convicted defendant the right to a speedy disposition of an appeal from that conviction. A criminal conviction rebuts the presumption of innocence which underlies the right to a speedy trial. United States v. Alston, 412 A.2d 351, 358 (D.C. 1980). Moreover, since a defendant has no federal constitutional right to an appeal, see Evitts v. Lucey, 105 S.Ct. 830, 834, reh'g denied, 105 S.Ct. 1783 (1985), it follows that a defendant has no federal constitutional right to a speedy appeal. Doescher v. Estelle, 454 F.Supp. 943, 949 (N.D. Tex. 1978), appeal dismissed, 597 F.2d 281 (5th Cir. 1979).

The unanimous weight of authority establishes that a convicted defendant has no Sixth Amendment right to a speedy appeal. See, e.g., Roberson v. Connecticut, 501 F.2d 305, 310-11 (2d Cir. 1974) (Mansfield, J., concurring); United States

v. Cifarelli, 401 F.2d 512, 514 (2d Cir.), cert. denied, 393 U.S. 987 (1968); Doescher v. Estelle, supra, 454 F.Supp. at 950; United States v. Alston, supra, 412 A.2d at 356; State ex rel. Jones v. Court of Common Pleas, 378 N.E.2d 471, 472 (Ohio 1978); Zanders v. State, 515 S.W.2d 907, 909 (Tex. Cr. App. 1974), cert. denied, 421 U.S. 951 (1975); State v. Lagerquist, 176 S.E.2d 141, 142 (S.C. 1970), cert. denied, 401 U.S. 937 (1971).

Petitioner, while citing no contrary authority, contends that the foregoing authority conflicts with this Court's recent decision in United States v. Loud Hawk, 106 S.Ct. 648, reh'g denied, 106 S.Ct. 1289 (1986). In Loud Hawk, this Court noted that Sixth Amendment "safeguards may be as important to the accused when the delay is occasioned by an unduly long appellate process as when the delay is caused by a lapse between the

initial arrest and the drawing of a proper indictment . . . or by continuances in the date of trial . . . ." Id. at 655 (citations omitted). In Loud Hawk, however, this Court clearly referred to interlocutory appeals which may delay the time in which an unconvicted defendant is brought to trial. This Court held that, under the circumstances of that case, delays attributable to interlocutory appeals would not be weighed in assessing the unconvicted defendant's right to a speedy trial. Id. at 650-51. Nothing in either the majority or dissenting opinions implied that the Sixth Amendment guaranteed a convicted defendant the right to a speedy post-conviction appeal.

Petitioner also cites Justice Brennan's observation in Dickey v. Florida, 398 U.S. 30 (1970), that "[d]elay may also occur during the appellate process . . . ." 398 U.S. at 43 n.4 (Brennan, J., con-

curring). Petitioner fails to point out, however, that Justice Brennan explicitly declined to consider whether the Sixth Amendment applied to such delay. Id.

Because neither this Court nor any other court has ever challenged the well-established proposition that a convicted defendant has no Sixth Amendment right to a speedy appeal, Petitioner's Sixth Amendment claim fails to raise an important question of federal law.

B. Assuming Arguendo That The Sixth Amendment Did Guarantee A Convicted Defendant The Right To A Speedy Appeal, There Was No Violation Of That Right Under The Facts Of This Case.

Assuming arguendo that Petitioner did have a Sixth Amendment right to a speedy appeal, there was no violation of that right given (1) the number and complexity of issues raised in Petitioner's appeal, (2) the fact that Petitioner was released

on bail during the pendency of the appeal, and (3) the fact that Petitioner never asserted his Sixth Amendment right. Thus, even if this Court were inclined to consider whether the Sixth Amendment guarantees a convicted defendant the right to a speedy appeal, this would be an inappropriate case in which to do so.

In determining whether a defendant has been denied his Sixth Amendment right to a speedy trial, the court must assess the "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." Barker v. Wingo, 407 U.S. 514, 530 (1972). Applying these factors to the case at bar reveals that Petitioner's speedy trial rights, if any, have not been infringed.

First, Petitioner must demonstrate a delay which is presumptively prejudicial in order to trigger an inquiry into the remaining three factors. Barker v. Wingo,

supra, 407 U.S. at 530. "[B]ecause of the imprecision of the right to a speedy trial, the length of delay that will provoke such an inquiry is necessarily dependant upon the peculiar circumstances of the case." Id. at 530-31. In the case at bar, Petitioner's appeal arose out of a trial in which Petitioner and a co-defendant were convicted of several counts of perjury involving three intricate real estate transactions. Petitioner and his co-defendant each filed separate briefs raising twenty-seven statutory, constitutional, and evidentiary issues, including a challenge to the sufficiency of the evidence. After "a thorough and exhaustive review of the transcripts, exhibits, and other documents" and after "research[ing] a multiplicity of detailed and technical arguments [raised] in several different contexts," State v. Sands, supra, 123 N.H.

at 617, 467 A.2d at 232, the New Hampshire Supreme Court issued a forty-nine page opinion. Given these facts, the twenty-nine month period between oral argument and decision was clearly warranted and was not presumptively prejudicial. See Harrison v. United States, 392 U.S. 219, 221 n.4 (1968) (delay in appellate proceedings resulting from "need to assure careful review of an unusually complex case" did not violate speedy trial rights of defendant brought to trial for third time eight years after indictment).

Second, even if such a delay were presumptively prejudicial, legitimate reasons for the delay weigh heavily against an asserted violation of Petitioner's speedy trial rights. As the district court noted, any delay in deciding Petitioner's appeal was due to the death of two justices assigned to the case as well as to the

complexity of the legal issues raised. (Appendix, p. B-27). Any delay due to the justices' death is properly excludable from the speedy trial period. See United States v. Savoca, 739 F.2d 220, 224 (6th Cir. 1984), rev'd on rehearing on other grounds, 761 F.2d 292 (6th Cir.), cert. denied, 106 S.Ct. 153 (1985) (delay caused by continuance granted on district judge's motion after he suffered heart attack, underwent surgery, and recuperated was properly excludable from speedy trial period); United States v. Corley, 548 F.2d 1043, 1043-44 (D.C. Cir. 1976) (delay resulting from illness of trial judge to whom case had originally been assigned was properly excluded from speedy trial period). Even if such delay is attributable to the State, as Petitioner contends, it is entitled to less weight than delay due to prosecutorial considerations. Cf. United States v. Loud Hawk, supra, 106 S.Ct. at 656 (delay from

overcrowded courts to be weighed less heavily than deliberate attempt to delay trial to hamper defense).

Third, Petitioner never once asserted his right to a speedy appeal while the appeal was pending. This Court has "emphasize[d] that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial." Barker v. Wingo, supra, 407 U.S. at 532. Petitioner contends that there is no procedural mechanism for making such an assertion to the New Hampshire Supreme Court. However, New Hampshire has a liberal pleading practice, and the Supreme Court Rules provide parties with a mechanism for filing both substantive and procedural motions. N.H. Sup. Ct. R. 21. Petitioner further contends that, "a defendant's primary concern is that the issues that he raised be properly decided with due deliberation" and that,

"aggressive assertions for a speedy decision could result in a decision without due deliberation." (Petition, p. 12). This argument only underscores the fact that a speedy disposition of his appeal was not in the best interests of Petitioner, who stood to benefit from a well-considered treatment of the issues raised. Petitioner should not be permitted to use the appellate process as a sword as well as a shield. Thus, Petitioner's failure to assert his right must be weighed against him.

Finally, prejudice to a defendant denied a speedy trial may occur in the form of oppressive pre-trial incarceration, anxiety and concern over outstanding criminal charges, and the possibility of impairment to the defense. Barker v. Wingo, supra, 407 U.S. at 532. Of these, the latter form of prejudice is the most serious. Id. In the case at bar,

Petitioner was released on bail during the pendency of his appeal. In addition, his convictions were affirmed, eliminating any possibility of impairment to the defense of future trials. Thus, the only prejudice which Petitioner can assert is the anxiety caused by outstanding criminal charges. However, the anxiety inherent in any delay, standing alone, is insufficient to warrant reversal of a conviction on speedy trial grounds. See United States v. Mitchell, 723 F.2d 1040, 1049-50 (1st Cir. 1983); United States v. Varella, 692 F.2d 1352, 1359 (11th Cir. 1982), cert. denied, 463 U.S. 1210 and 464 U.S. 838 (1983). Thus, Petitioner cannot demonstrate sufficient prejudice to warrant habeas relief.

Because Petitioner would not have been denied his right to a speedy appeal, even if such a right existed, this is an inappropriate case in which this Court to

consider if the Sixth Amendment guarantees a convicted defendant the right to a speedy appeal.

C. The District Court Properly Recognized That Although State Appellate Delay May Constitute A Violation Of Due Process, The Delay In This Case Was Not So Prejudicial As To Violate All Notions Of Fundamental Fairness.

The district court held that, in determining whether "state appellate delay violated [Petitioner's] due process right, the Court must consider whether such delay was so prejudicial as to violate all notions of fundamental fairness." (Appendix, p. B-27). The court concluded that there was no such prejudice in the instant case. Id. Because the district court applied the proper standard and because its conclusion was amply supported by the facts of the case, Petitioner's due process claim does not raise an important issue of federal law.

Although the federal constitution does not require states to grant appeals as of right to criminal defendants, "if a State has created appellate courts as 'an integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant,' . . . the procedures used in deciding appeals must comport with [due process]." Evitts v. Lucey, supra, 105 S.Ct. at 834 (citation omitted). Thus, several courts have held that substantial delay in processing an appeal may constitute a denial of due process. See, e.g., Jones v. Crouse, 360 F.2d 157, 158 (10th Cir. 1966); Doescher v. Estelle, supra, 454 F.Supp. at 950. See also United States v. Lovasco, 431 U.S. 783, 789 (1977) (holding, in context of pre-indictment delay, that "the Due Process clause has a limited role to play in protecting against oppressive delay.")

Virtually every case in which a defendant has challenged appellate delay on due process grounds has involved delay between the filing of a notice of appeal and argument. See, e.g., Rivera v. Concepcion, 469 F.2d 17 (1st Cir. 1972); Gross v. United States, 408 F.2d 1297 (D.C. Cir. 1969); Jones v. Crouse, supra. Courts are reluctant to permit scrutiny of the deliberative period following argument since "the appellate court's lawmaking function is inherently time-consuming." United States v. Alston, supra, 412 A.2d at 360 (appellate judges must collaborate on a satisfactory disposition and evaluate the potential impact of their decision beyond the case at issue). Thus, it is uncertain whether any period of deliberative delay at

the appellate level will constitute a violation of due process.[1]

To the extent that deliberative appellate delay may constitute a denial of due process, Petitioner must demonstrate actual as opposed to possible prejudice. See United States v. Marion, 404 U.S. 307, 325-26 (1971) (preindictment delay implicating due process). To establish actual prejudice, Petitioner must demonstrate either prejudice to the conduct of his defense or that the State intentionally delayed to gain some tactical advantage or to harass him. Id. at 325. See also

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[1] Petitioner concedes that application of a defendant's rights to fundamental fairness and due process of law "has not occurred in the context of a case involving an appellate delay similar to this action." (Petition, pp. 6-7). The cases cited by Petitioner concerning delay between the imposition and execution of sentence are inapposite since none involve the necessarily time-consuming task of appellate deliberation.

United States v. Alston, supra, 412 A.2d at 359 (predominant concern when defendant faces appellate delay is prejudice to ability to defend against charge in event of second trial).

In the case at bar, the district court properly held that the state appellate delay was not so prejudicial as to violate Petitioner's due process rights. The court noted that the delay did not jeopardize the fairness of a possible retrial, since Petitioner's convictions were affirmed. (Appendix, p. B-27). In addition, the delay did not result in prolonged incarceration since Petitioner was free on bail. Finally, the court correctly determined that Petitioner's personal woes and anxiety were insufficient to establish actual prejudice under Marion. (Appendix, p. B-27). See United States v. Alston, supra, 412 A.2d at 362 (emotional distress derived from lengthy

appellate deliberation does not constitute prejudice sufficient to offend due process). Thus, Petitioner cannot establish actual prejudice.

Moreover, "proof of prejudice is . . . a necessary but not sufficient element of a due process claim, and . . . the due process inquiry must consider the reasons for the delay as well as the prejudice to the accused." United States v. Lovasco, supra, 431 U.S. at 790 (pre-indictment delay implicating due process). As the district court noted, delay in the case at bar was largely attributable to the death of two justices assigned to the case as well as to the complexity of the legal issues raised. (Appendix, p. B-27). Thus, the absence of actual prejudice to Petitioner and the clearly legitimate reasons for delay support the district court's holding that

Petitioner's due process rights, if any, were not violated.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

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